CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 387

RUTH J. HENKEL, AS ADMINISTRATRIX AND PERSONAL REPRESENTATIVE OF THE ESTATE OF CARL E. P. HENKEL, DECEASED,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FILED SEPTEMBER 17, 1931

(36,201)

(36,201)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 28, 1931

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, MAY TERM, A. D., 1931

No. 9090

RUTH J. HENKEL as Administratrix and Personal Representative of the Estate of Carl E. P. Henkel, Deceased, Appellant,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellee

Appeal from the District Court of the United States for the District of Minnesota

Certificate of Question—Filed Aug. 28, 1931

Mr. Robert J. McDonald, Mr. William A. Tautges, and Mr. Bertram W. Wilder submitted brief for appellant.

Mr. Alfred E. Rietz, Mr. William T. Faricy, and Mr. Warren Newcome submitted brief for appellee.

Before Kenyon and Booth, Circuit Judges, and Dewey, District Judge

STATEMENT OF CASE

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that a record on an appeal now pending before it discloses the following: Ruth J. Henkel, as Administratrix and Personal Representative of the Estate of Carl E. P. Henkel, Deceased, brought an action at law against Chicago, St. Paul, Minneapolis & Omaha Railway Company, a corporation of the State of Wisconsin, in the United States District Court for the District of Minnesota, to recover damages on account of the death of said Carl E. P. Henkel, her husband, who was a brakeman in the employ of the Defendant Company on one of its freight trains which was wrecked by reason of a washout. Plaintiff at the time of bringing suit was a resident [fol. 2] of Nebraska. At the time of the accident, plaintiff

and her husband were residents of Iowa. The action was brought under the provisions of the Federal Employers' Liability Act, the complaint alleging that the deceased at the time of his death and the Railroad Company were both engaged in interstate commerce. Various items of negligence were alleged, including failure to use due care in the maintenance of the track and roadbed in a reasonably safe condition.

The case was tried and resulted in a verdict and judgment for the plaintiff. Application was made by plaintiff to the court for an order allowing fees, in sums named, for two expert witnesses, civil and hydraulic engineers, who had testified at the trial, and directing that such sums be taxed against the defendant, and directing the Clerk of the Court to include such amounts in a judgment in plaintiff's favor. The subject of the testimony of the two witnesses was a proper one for expert testimony, and the witnesses were qualified as experts. Defendant objected to the allowance of expert witness fees upon the ground that there was no authority of law for the taxation of expert witness fees in said court, and that the same could not be legally taxed against the defendant.

In its order denying the plaintiff's motion, the trial court said:

"Upon application of the plaintiff, the court has further considered this matter and as a part of this court's order denying plaintiff's motion, finds that under the practice prevailing within the State of Minnesota in the state courts, plaintiff would be entitled to an allowance of Twenty-five ($25.00) Dollars per day for the twenty-one days the two experts actually spent in court in attendance upon the trial, which would be in the sum of Five hundred twenty-five ($525.00) Dollars, and that such sum of Five hundred twenty-five ($525.00) Dollars should be added to the judgment in the case at bar, except for the fact that I am of the opinion that I am without power and authority to allow plaintiff expert fees in view of the Federal statute; but if the state practice could be allowed in the Federal [fol. 3] court, or if I had the power and authority to allow plaintiff expert fees, I would allow plaintiff the sum of Five hundred twenty-five ($525.00) Dollars as expert fees to be added to the judgment in this cause * * *."

From the order denying the allowance of expert witness fees, a cross appeal was taken to this court by plaintiff, defendant having already appealed from the judgment entered upon the verdict.

Section 7009 of Mason's Minnesota Statutes for 1927, Volume II, provides:

"Expert Witnesses.—The judge of any court of record, before whom any witness is summoned or sworn and examined as an expert in any profession or calling, may, in his discretion, allow such fees or compensation as in his judgment may be just and reasonable."

In the state courts of Minnesota it has been the usage and practice for many years under this statute to allow reasonable expert fees, which are added to the taxable costs and become part of the judgment. The amount named in the order of the trial court is not in excess of the amount usually allowed in the state courts of Minnesota.

No such usage or practice exists in the federal court in Minnesota, but the practice in regard to the matter is not uniform in the federal courts throughout the circuit.

The contention of the appellant is:

"The Court below possessed the power, authority and discretion to follow the prevailing state practice within the State of Minnesota, which is to the effect that expert fees are allowable in the discretion of the trial court, and as the allowance of expert fees is not prohibited by either the Federal statutes or Court rule, the Court possessed the inherent power to allow the same."

The contention of appellee is that "Congress has provided for the payment and taxation of witness fees and therefore the State statute or rule does not obtain in Federal Court."

This court, being in doubt, desires the instruction of the Supreme Court upon the following question, a decision of which is deemed indispensable to a determination of the [fol. 4] appeal No. 9090 now pending before it, and to a proper discharge of its duties therein:

QUESTION CERTIFIED

Question: Has a United States District Court power and authority to allow expert witness fees, and to include the

same as part of the taxable costs in a law case, said United States District Court being for and sitting in a State the Courts of which are by a state statute authorized, in their discretion, to allow expert witness fees, and the practice and usage in said state courts being to make such allowances and to include the same in the taxable costs, but there being no such usage and practice in said United States District Court?

William S. Kenyon, United States Circuit Judge.
Wilbur —. Booth, United States Circuit Judge.
Charles A. Dewey, United States District Judge.

[File endorsement omitted.]

[fol. 5] In United States Circuit Court of Appeals, Eighth Circuit

Clerk's Certificate

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing Certificate in the case of Ruth J. Henkel, as Administratrix and Personal Representative of the Estate of Carl E. P. Henkel, Deceased, Appellant, vs. Chicago, St. Paul, Minneapolis & Omaha Railway Company, No. 9090, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said Certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony Whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 1st day of September, A. D. 1931.

E. E. Koch, Clerk of the United States Circuit Court of Appeals, Eighth Circuit. (Seal United States Circuit Court of Appeals, Eighth Circuit.)

Endorsed on cover: Certificate. File No. 36,201. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 387. Ruth J. Henkel, as administratrix and personal representative of the estate of Carl E. P. Henkel, deceased, vs. Chicago, St. Paul, Minneapolis & Omaha Railway Company. Certificate. Filed September 17, 1931. File No. 36,201.

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FILED
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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 387.

RUTH J. HENKEL, AS ADMINISTRATRIX AND PERSONAL REPRESENTATIVE OF THE ESTATE OF CARL E. P. HENKEL, DECEASED, *Appellant,*

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, *Appellee.*

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

APPELLANT'S BRIEF.

ROBERT J. McDONALD,
WILLIAM A. TAUTGES,
BERTRAM W. WILDER,
FREDERICK M. MINER,
Counsel for Appellant.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 387.

RUTH J. HENKEL, AS ADMINISTRATRIX AND PERSONAL REPRESENTATIVE OF THE ESTATE OF CARL E. P. HENKEL, DECEASED, *Appellant*,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, *Appellee*.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

APPELLANT'S BRIEF.

STATEMENT OF CASE.

A complete statement of the case, in concise form, has been prepared by the United States Circuit Court of Appeals for the Eighth Circuit, and appears on pages 1 to 3, inclusive, of the Certificate, which forms the basis of the question certified to this Court, appearing on pages 3 and 4 of the Certificate, and although not strictly in conformity with the rules, we think it unnecessary to indulge in repetition and here repeat a statement of the case, because the same has been well stated by the Circuit Court of Appeals.

ASSIGNMENT OF ERRORS.

I.

The United States District Court, for the District of Minnesota, erred in holding that it was without power and authority to allow expert fees under the Federal Statutes, and that the Court was without power and authority to exercise any discretion in the matter, for the reason that the Court possessed inherent power to allow expert fees, and for the reason that the allowance of expert fees in Federal Courts is not prohibited by the Federal Statutes and is not contrary to any rule of Court.

II.

The United States District Court, for the District of Minnesota, erred in holding that it was without power and authority to follow the prevailing state practice within the State of Minnesota, and allow to appellant expert fees, and that no discretion was vested in the Court permitting it to follow the state practice, for the reason that the Court possessed, not only the power and authority, but the discretion, as well, to follow the state practice and to allow appellant expert fees.

ARGUMENT.

THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF MINNESOTA, POSSESSED THE POWER, AUTHORITY AND DISCRETION TO FOLLOW THE PREVAILING STATE PRACTICE WITHIN THE STATE OF MINNESOTA, WHICH IS TO THE EFFECT THAT EXPERT FEES ARE ALLOWABLE IN THE DISCRETION OF THE TRIAL COURT, AND AS THE ALLOWANCE OF EXPERT FEES IS NOT PROHIBITED BY EITHER THE FEDERAL STATUTES OR COURT RULE, THE COURT POSSESSED THE INHERENT POWER TO ALLOW THE SAME.

In the state courts of Minnesota, the allowance of expert fees is discretionary with the trial court as to the amount to be taxed.

Section 7009 of *Mason's Minnesota Statutes for 1927*, Volume II, provides:

> "The judge of any court of record, before whom any witness is summoned or sworn and examined as an expert in any professional calling, may, in his discretion, allow such fees or compensation as in his judgment may be just and reasonable."

In *Farmer, et al., vs. Stillwater Water Co., et al.*, 86 Minn 59, 90 N. W. 10, the Supreme Court of Minnesota held:

> "Hydraulic engineers, called as witnesses to testify to the nature, cost, and efficiency of the water system, were experts, and entitled to reasonable fees as such."

In *Melander vs. County of Freeborn*, 170 Minn. 378, 381, 212 N. W. 590, the Supreme Court of Minnesota said:

> "An appeal comes to us from the order of the Court refusing to allow expert witness fees for a civil engineer, whom plaintiffs called as an expert witness.

> Whether such fees are to be allowed, rests exclusively with the trial court. It is entirely a discretionary matter. * * * These cases do not hold that a civil engineer may not be allowed expert fees for appearing as a witness in court, but relate to services involved in preparation for trial. As a witness in court he is the same as any other expert. Since, however, the question upon its merits rests with the trial court, the party may, if so advised, make a further application for an allowance."

It has been the practice in the state courts of Minnesota for many years to allow reasonable expert fees, which are added to taxable costs and become a part of the judgment, and in most counties within the State of Minnesota, the sum of $25.00 per day is the usual amount allowed to an expert witness.

The laws of the State of Minnesota apply in actions tried in the Federal Court of Minnesota, with respect to the allowance of expert fees.

Section 725 of Title 28, *United States Code Annotated*, provides as follows:

> "The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials of common law in the courts of the United States in cases where they apply."

Scatcherd vs. Love, 166 Fed. 53, 91 C. C. A. 639 (6th C. C. A.).

Bone vs. Walsh Construction Co., 255 Fed. 901. (Dist. Ct. Ia.).

Ethridge vs. Jackson, 8 Fed. Cases, No. 4541, 17 Fed. 1290.

In *Ethridge vs. Jackson, supra,* the Court said:

"I think that giving or withholding costs in a particular case is not a mere matter of practice. Costs are of the substance of the controversy and not the form. They are a part of a judgment and affect the right of the party as well as the recovery of the principal sum or thing. Therefore, I agree with Mr. Justice Woodbury in *Hathaway vs. Roch* (Cir. Mass., 1847), 11 Fed. Cases, No. 6213, that the subject of who shall recover costs in a common law action is within the purview of Section 34 of the Judiciary Act, which provides: 'The laws of the several states * * * shall be regarded as rules of decision in trials at common law in courts of the United States in cases where they apply.' The cases upon this subject are meagre and not satisfactory or in accord. In my judgment it is clear that the right to costs in this action, not the mere mode of taxing them for enforcing such right, depends upon the laws of this state, because Section 34 of the Judiciary Act makes such law the rule of decision herein, the rule by which the rights of the parties are ascertained and measured in respect to all matters which enter into and form part of the judgment or are determined by it."

Because the allowance of expert fees is not prohibited by the Federal Statute, and the rule of the Federal Court does not prohibit such allowance, it would seem that the Court possesses the inherent power to allow such fees as may be necessary to secure an intelligent consideration of a case.

In the Matter of Walter Peterson, as Receiver of the Interstate Coal Company, Inc., Petitioner, 253 U. S. 300, 64 L. Ed. 919, it was held by the United States Supreme Court that the fees of an auditor in a law action might be allowed

as costs, and the Court said (page 317, U. S. Rep.):

> "As there is no statute, Federal or state, and no rule of court excluding auditor's fees and the expense of his stenographer from the items taxable as costs, no reason appears why they may not be included, like other expenditures ordered by the court with a view to securing an intelligent consideration of a case."

In *People of Sioux County, Nebraska, vs. National Surety Co.*, 276 U. S. 238, 72 L. Ed. 547, the Supreme Court of the United States held that, since the law of Nebraska provided that an attorney's fee might be taxed as costs, the Federal Court could include such a fee in a judgment in a case removed from the state court of that state, and in such opinion, the United States Supreme Court said (page 243, U. S. Rep.):

> "Disregarding mere matters of form it is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its court in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the Federal Courts.
>
> "That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like, allowed to counsel by R. S., §§ 823, 824.
>
> "The present allowance, since it is not costs in the ordinary sense, is not within the field of costs legislation covered by R. S., §§ 823, 824. That the particular

mode of enforcing the right provided by the state statute—*i. e.*, by taxing the allowance as costs—is not available to the Federal Courts under R. S., §§ 823, 824, does not preclude the recovery. Since the right exists the Federal Courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment."

In *Business Men's Assur. Co. of America vs. Campbell*, 18 Fed. (2d). 223 (8th C. C. A.), this Court held:

"The statutory provisions as to costs to be taxed in a Federal Court apply to costs in ordinary meaning, and do not prevent enforcement in that court of a state statute authorizing allowance of attorney's fees in certain cases, because it provides that they shall be taxed as costs."

It would appear, therefore, that an expenditure ordered by the Court for the purpose of securing an intelligent consideration of an action at law may be taxed against the losing party, unless that is prohibited by statute. It would also appear that, where it is the practice and policy of a state to permit certain fees to be allowed by the Court and added to the judgment as costs or otherwise, the Federal Courts are not precluded from making such allowance, if the fees are not "costs in the ordinary sense of the traditional, arbitrary and small fees of court officers" and the like.

In the *Peterson* case, *supra*, it is pointed out that "the allowance of costs in the Federal Courts rests not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes," and that as to costs not covered by Federal Statutes, the Courts will follow the state laws.

Expert fees allowed by Section 7009 of *Mason's Minnesota*

Statutes for 1927, Volume II, are not ordinary costs. The state law recognizes the fact that in many cases, in order that the facts may be intelligently presented to a jury, the parties must produce expert witnesses whose opinions cannot be obtained for the small sums allowed by law for ordinary witnesses. The allowance of expert fees seems analogous to the allowance of attorney's fees in the case of *People of Sioux County, Nebraska, vs. National Surety Co., supra.* It differs somewhat from the allowance to the auditor in the Peterson case, *supra*, because the experts were not ordered produced by the Court. The allowance of expert fees under the state statute is a recognition of the necessity of expert witnesses for an intelligent disposition of a case.

This action was under the Federal Employers' Liability Act and was properly triable in either the Federal or State Courts in Minnesota. Had the case been tried in the State Court, such court would have allowed expert fees, and it seems to us that the state statute should be allowed, otherwise appellant is penalized for instituting and proseeuting her case in the Federal Court.

Upon this appeal, there is no question involved except the question of whether or not expert fees can be properly allowed because the Court provided that if he possessed the power or authority to allow expert fees, either under the Federal Statutes, or by following the Minnesota state practice, that he would allow the sum of $525.00 and that in the event this Court determined that he possessed such power, that such sum of $525.00 should be added to the judgment in appellant's favor.

CONCLUSION.

Appellant respectfully submits that the United States District Court, for the District of Minnesota, erred in denying her application to tax expert fees against appellee, because such Court possessed the power, authority and discretion to follow the state practice, and as expert fees are not prohibited by either Federal Statute or court rule, the Court has the discretion and power to allow the same.

Wherefore, appellant respectfully prays that the decision of the United States District Court for the District of Minnesota be set aside and reversed by this Honorable Court.

Respectfully submitted,

ROBERT J. MCDONALD,
WILLIAM A. TAUTGES,
BERTRAM W. WILDER,
FREDERICK M. MINER,
Counsel for Appellant.

ADDITIONAL CITATION.

Expert fees may be taxed under Maine statute. *Aetna Life Insurance Company* v. *Allen, 32 Fed. (2d) 490 at 494.* "The court's allowance as part of plaintiffs' cost of expert fees under R. S. Me. c. 118, Sec. 9, was correct. Compare Primrose *v.* Fenno (C. C.) 113 F. 375; Michigan Aluminum Foundry Co. *v.* Aluminum Co. of America (C. C.) 190 F 903."

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DEC 28 193

CHARLES ELMORE CR
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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 387.

RUTH J. HENKEL, as Administratrix and Personal Representative of the Estate of CARL E. P. HENKEL, deceased,

Appellant,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,

Appellee.

On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

APPELLEE'S BRIEF.

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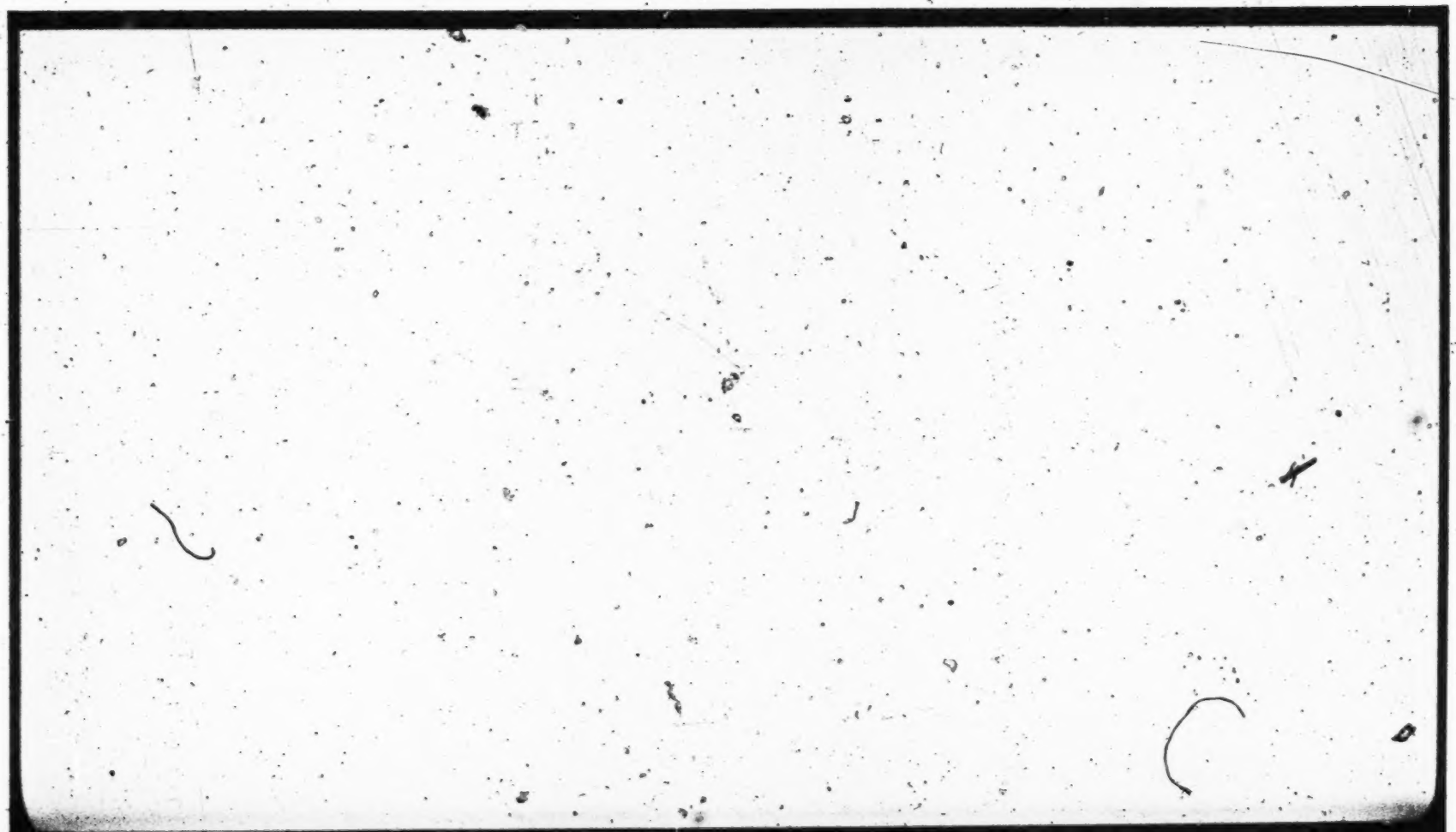

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Supreme Court of the United States

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No. 387.

RUTH J. HENKEL, as Administratrix and Personal Representative of the Estate of CARL E. P. HENKEL, deceased,

Appellant,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,

Appellee.

On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

The sole question involved here is whether or not a Federal District Court has the power to allow expert witness fees (aside from the statutory fees for any witness) to be taxed as costs in a law case. The facts which give rise to this question have been clearly, succinctly and impartially stated by the court below and are printed in the certificate at Pages 1 to 3

thereof. In the interests of brevity we, therefore, refrain from repeating them here.

ARGUMENT.

THE FEDERAL STATUTES ON TAXATION OF WITNESS FEES OCCUPY THE ENTIRE FIELD TO THE EXCLUSION OF STATE STATUTES AND PRACTICES, AND SINCE THEY MAKE NO PROVISION FOR EXPERT WITNESS FEES, ASIDE FROM THE STATUTORY FEES FOR ANY WITNESS, SUCH EXPERT FEES ARE NOT TAXABLE.

The Act of Congress of April 26, 1926, Chapter 183, 44 Stat. 323, which appears in the various supplements to the United States Code under Title 28, Judicial Code and Judiciary, Sections 600a, 600b, 600c and 600d under the subhead "Fees of Jurors and Witnesses", so far as may be material here provides as follows:

> "600a. Per diem; mileage.—That * * * witnesses * * * in the United States Courts * * * who attend * * * shall be entitled to a per diem for each day of actual attendance and for each day necessarily occupied in traveling to attend court * * * and return home, and in addition, mileage as hereinafter provided." (* * * Denote omission of matter not material here).
>
> "600c. Amount of per diem and mileage for witnesses; subsistence.—Witnesses attending in such courts * * * shall receive for each day's attendance and for the time necessarily occupied in going to and returning from the same $2.00 and 5¢ per mile for going from his or her place of residence to the place of trial or hearing and 5¢ per mile for returning; and provided further, that witnesses * * * in the United States Courts * * * who attend court * * * at points so far removed from their respective residences as to prohibit return thereto from day to day, shall, when this fact is certified to in the

order of the court * * * be entitled in addition to the compensation provided by existing law, as modified by this Act, to a per diem of $3.00 for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to attend court and return home."

Section 983 of the Revised Statutes which is in the United States Code, Title 28, Section 830, is the authority for taxation of costs and provides as follows:

"Same; bill of; taxation.—The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party; shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause".

Since these statutes provide just what witness fees shall be and when and how they shall be taxed, and make no exception as to expert witnesses, it follows, on familiar principles, that state statutes have nothing to do with the subject.

There are four reported cases in the Federal Courts directly in point and all four hold that fees for experts are not taxable beyond the statutory amount for any witness. These four cases are the following:

The William Branfoot, 52 Fed. 390 (C. C. A. Fourth Circuit);

In re Carolina Cooperage Co., 96 Fed. 604 at 605 (District Court Eastern District of North Carolina);

Bone v. Walsh Construction Co., 285 Fed. 901 (District Court Southern District of Iowa);

Cheatham Electric Switching Device Co. v. Transit Development Co., 261 Fed. 792 (C. C. A. Second Circuit).

In The William Branfoot, 52 Fed. 390, the Circuit Court of Appeals of the Fourth Circuit had this question before it, and under predecessor statutes of those now on the books, not differing therefrom in their material aspects, affirmed a holding of the District Court for the District of South Carolina, that "the compensation of experts called by the party in his own behalf cannot be taxed against the losing party as costs or as extra allowances and disbursements under the statute." The Circuit Court of Appeals said:

> "We think the court was right, and that as these charges, including expenses and disbursements, were not incurred under any action of the court, but by the party in the preparation and presentation of his own side of the case, the items were properly disallowed."

This case has been cited as authority on this proposition in other cases, and its doctrine has not been departed from for over thirty-nine years.

In re Carolina Cooperage Co., 96 Fed. 604, the United States District Court for the Eastern District of North Carolina, on the authority of The William Branfoot, held as follows:

> "The reduction of the allowance for witnesses before the commissioner from $10 to $3, as charged in the bill of costs, is approved as far as it goes, but it does not go far enough to comply with the law. The witness fees are allowed in the bill of costs as 'expert witnesses'. Extra allowance to expert witnesses cannot be allowed or taxed against a losing party in a United States district court sitting in admiralty or bankruptcy, but must be paid, according to the statute, $1.50 per day for actual attendance, and mileage. Rev. St. § 848; The William Branfoot, 3 C. C. A. 155, 52 Fed. 390, and 8 U. S. App. 129. Any extra allowance to 'experts' is a matter of personal or private contract between the parties,—the one summoning the ex-

pert and the witness so summoned and used. The witness fees will therefore be reduced to the amount allowed by statute,—$1.50 per day for actual attendance,—and no more. And for this amount witnesses must prove their attendance, as provided by statute, before any fee can be taxed in a bill of costs."

In Bone v. Walsh Construction Co., 235 Fed. 901, Judge Wade of the United States District Court for the Southern District of Iowa, having this precise question before him, reviewed the authorities rather extensively on the general subject of costs in the United States Courts. He stated the question thus:

"The main question in this case relates to the money expended in employing expert witnesses. The amount thus expended is $780.15. No question is made by plaintiff that this amount is unreasonable or unnecessary; so that we are confronted with the question as to whether or not, in the absence of a statute, the expense for experts in the preparation of a case, and in attendance for the trial, aside from statutory witness fees, can be allowed as costs, either upon dismissal, or upon final decree."

After citing and quoting from The William Branfoot, supra, and In re Carolina Cooperage Company, supra, as we have done above, the learned court said that these quotations reflect the general law of the country upon the question, citing a number of cases to this proposition, with one lone Minnesota state court case to the contrary. The learned court went on to say:

"From one point of view, this rule seems to work an injustice, and no doubt it does in many cases. The view of the courts seems to be that such matters should stand upon the same footing as counsel fees, as to which Justice Swayne, in Oelrichs v. Spain, 15 Wall. 231, 21 L. Ed. 43, observes:

'In equity cases, when there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the expensa litis to which he may have been subjected. The parties in this respect are upon a footing of equality. * * * When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. * * * We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy.'

"The rule contended for would involve great uncertainty as to the amount for which the losing party would be liable. * * *

"In some of the states, as in Iowa, laws have been passed permitting the courts to allow experts additional per diem while in attendance upon the court; but Congress has made no such enactment, and no Legislature, so far as I have been able to find, has passed a law permitting the taxation as costs of the compensation of the expert for time expended in preparing to testify.

"Under the foregoing, I am required to overrule the application of the defendant for allowance of the amount paid to experts, except the sum of $1.25 per day and mileage."

It will be noted that in the case just cited, the state of the district in which the action was brought had a statute permitting allowance to experts of additional per diem while in attendance, but in view of the absence of any such congressional authority in the Federal Statutes prescribing witness fees, the court did not feel justified in applying the state statute.

In Cheatham Electric Switching Device Co. v. Transit Development Co., 261 Fed. 792, the Circuit Court of Appeals for

the Second Circuit had this question under consideration. The facts and its holding are thus stated in the opinion (Page 796):

> "The question of costs first above referred to is this: Defendants have twice paid an expert witness a considerable fee, in order that he might testify in the long series of litigations between these parties. It is urged that defendants should be permitted to tax the expert's fee on his second appearance as a disbursement. *Allowance* of costs, etc., in equity is discretionary but *definition* of costs and taxable disbursements is a matter settled by statute or ruling authority, and we hold that expert's fees as witnesses are not legally taxable as costs or disbursements. Ordinary witness fees are taxable under the statute to be sure, but on the theory that the law requires the witness to attend and speak. An expert sells his opinion, as counsel sells his services, and he cannot by law be compelled to testify at all, while an attorney may be compelled to serve. There is considerably less reason for taxing experts' fees than might be urged for taxing the expense of legal counsel." (Italics ours).

The unanimity of the cases on the subject would seem to settle this matter. Appellant insists, however, that Section 725 of Title 28 of the United States Code, which is Section 721 of the Revised Statutes, taken from the Act of September 24, 1789, Chapter 20, Section 34, 1 Stat. 92, requires or permits the use of the Minnesota state statutes on expert witness fees, notwithstanding that Congress has passed a statute prescribing witness fees generally, and making no exception as to experts. Section 725 of Title 28 of the United States Code (R. S. 721) provides as follows:

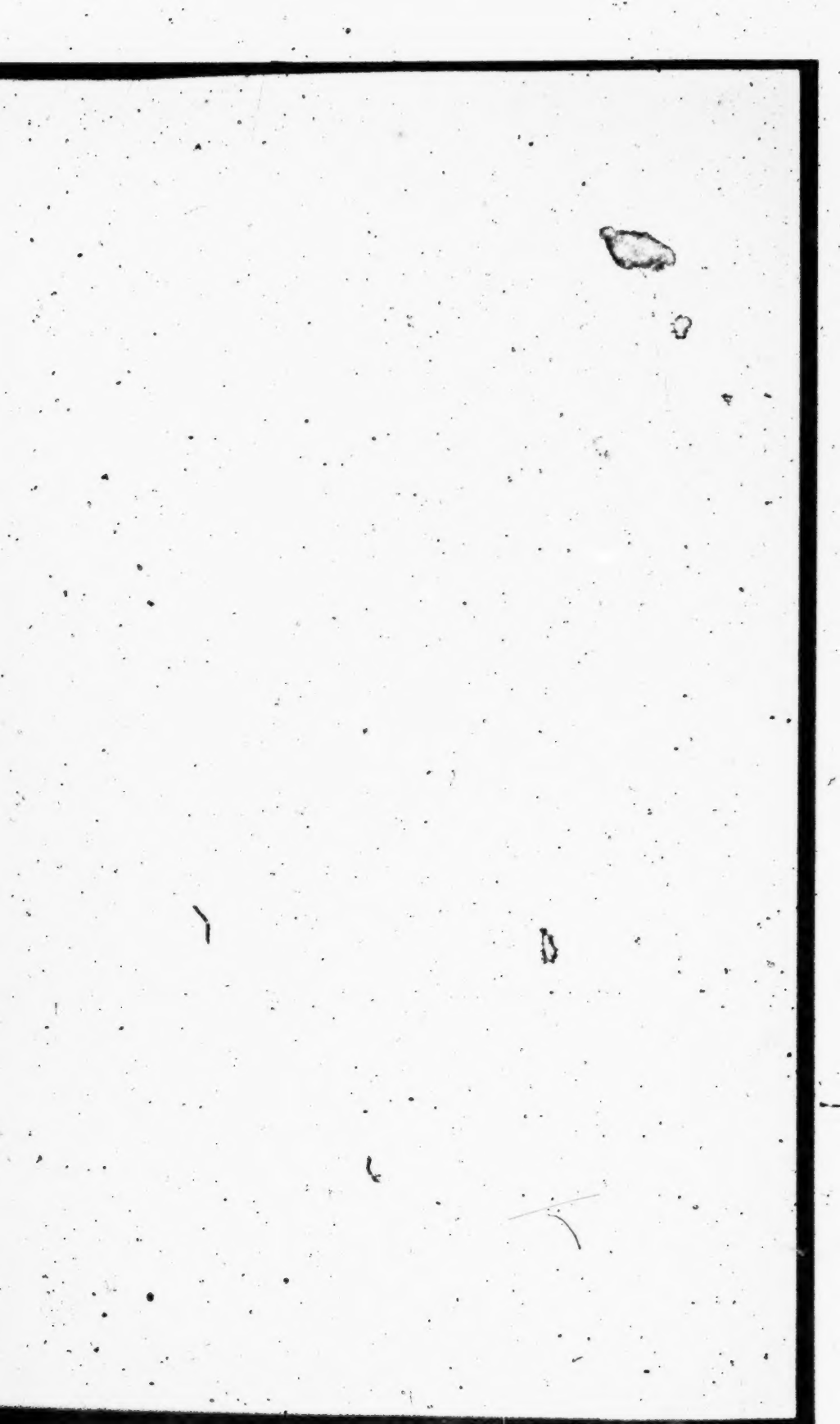
> "The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in

trials of common law in the courts of the United States in cases where they apply."

This statute is inapplicable by its terms to the situation here under discussion because of the enactment by Congress of statutes specifying what the witness fees shall be. It is one of the best known and most cited provisions in the United States Statutes. It has been in effect since long before the four decisions relied upon here were handed down. It is hardly conceivable that it could have been overlooked in the Bone case, supra, where there was an Iowa statute authorizing expert witness fees, just as there is a Minnesota statute here.

No reported Federal cases holding that expert witness fees are taxable have been found, and counsel for appellant have not cited any. We believe that there are none. Unless, therefore, this court is prepared to overturn what has been the unanimous rule of the Federal courts for nearly forty years, the certified question must be answered in the negative, and the conclusion which the learned trial court reached on the authority of the decided cases, thereby sustained.

The cases upon which appellant relies are not in point. Ethridge v. Jackson, 2 Sawyer's U. S. Court Reports, Ninth Circuit, 598; 8 Federal Cases 801, Number 4541, is an old case, dealing not with the question of what fees shall be taxed but whether the prevailing party recovering so small a verdict that the state law would allow costs to the defendant, may recover his costs notwithstanding such law. The court reached the conclusion that the state law would operate to prohibit plaintiff's costs, but would not operate to give costs to the defendant, because Section 3 of the Act of February 26, 1853 (now Section 830 of Title 28 of the U. S. Code; R. S. 983) awarded costs only to the prevailing party, and to that extent precluded



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Since the foregoing was written, the case of *Ætna Life Insurance Company* v. *Allen*, 32 Fed. (2d) 490, has been found. This case holds contrary to the four cases upon which we rely, but does not mention any of them. In so far as it may be said to rest on the Conformity Act, it was distinguished in *The Wahkeena*, 51 Fed. (2d) 106, an admiralty case.

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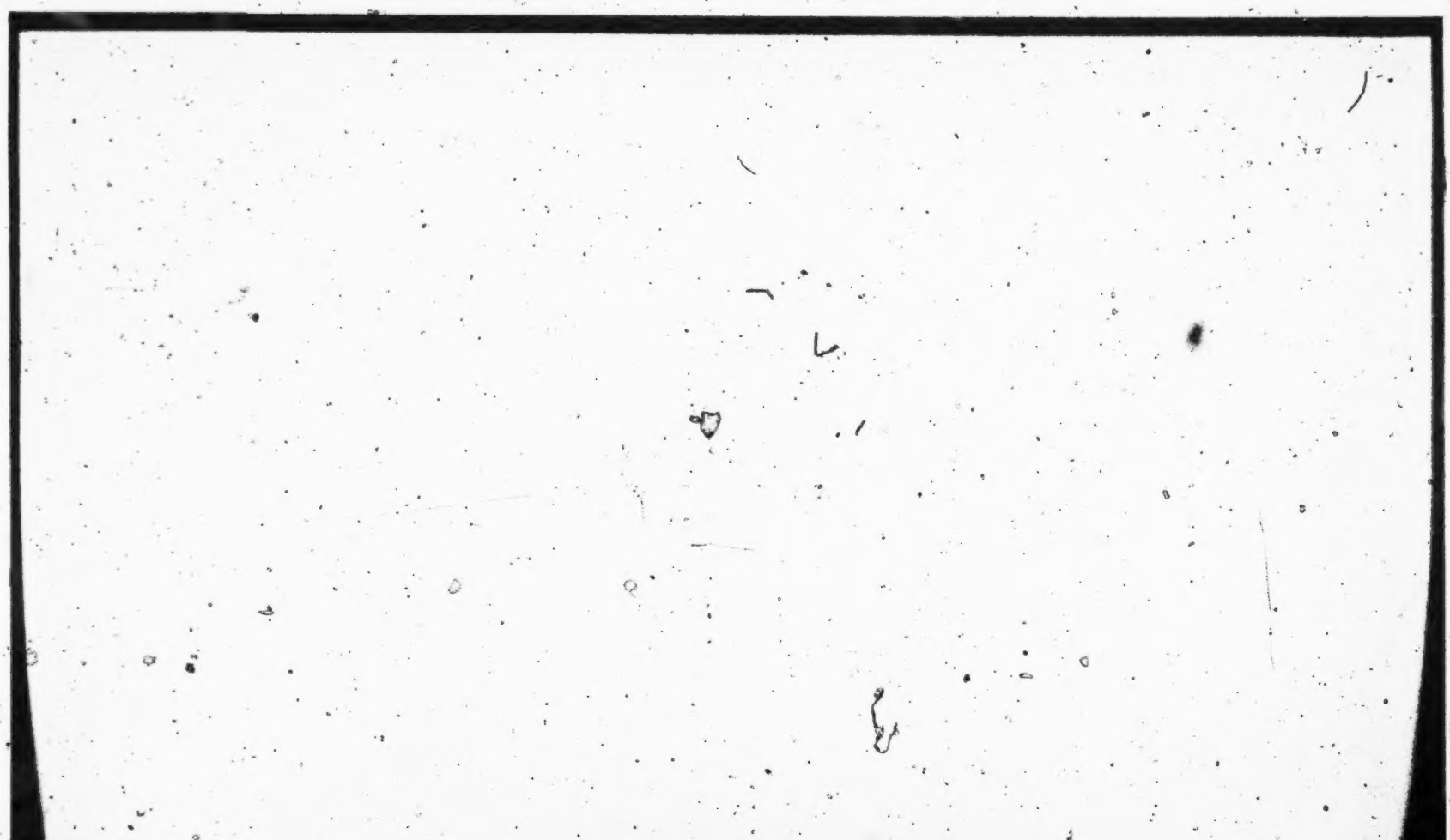

the operation of the state law. This court is not called upon here to determine the correctness or otherwise of that part of this decision which gives effect to a portion of the state law, although its correctness may well be doubted in the light of later cases. Compare United States v. Treadwell, 15 Fed. 532; Pentlarge v. Kirby, 20 Fed. 898; Trinidad Asphalt Paving Co. v. Robinson, 52 Fed. 347; Merritt v. Merritt, 20 Fed. (2d) 541; Ex parte Peterson as Receiver of the Interstate Coal Co., 253 U. S. 300, 40 S. Ct. 543, 64 L. E. 919. The court in the Ethridge case distinguished between the *right to costs* and the question *what items are taxable as costs*, and called specific attention to the fact that a Federal Statute defines the items of expense that are taxable. The court said:

> "The Act of February 26, 1853 (10 Stat. 168) provides what attorney's fees and items of expense are taxable as costs in the national courts",

citing, among other cases, Dedekam v. Voge, 7 Federal Cases 339, Number 3731. In the Dedekam case the court had said:

> "This court has uniformly held that every item of costs taxable against a party to a suit is specified in the fee bill enacted February 26th, 1853 (10 Stat. 161), and that it cannot go out of the provisions and restrictions of that act, and make an allowance of costs on any considerations of equity or justice. The province of the taxing officer is accordingly now limited to the service of comparing a proposed charge with the particulars set forth by congress in that statute as taxable; and, when the charge is not found to fall within the enumerated and designated fees, it must be rejected."

Scatcherd v. Love, 166 Fed. 53, also relied upon by appellant, is likewise a case on the question, what party is entitled to costs, rather than what costs are taxable, and for the reason

just given as to Ethridge v. Jackson, supra, this court is not called upon at this time to determine its correctness or otherwise, although the authorities given for comparison with Ethridge v. Jackson show that its correctness may well be doubted.

Ex parte Peterson as Receiver of the Interstate Coal Co., 253 U. S. 300, 40 S. Ct. 543, 64 L. E. 919, is likewise not in point. That was a case involving an expenditure *ordered by the court* with a view to securing an intelligent consideration of the case. It involved auditor's fees, which, unlike witness' fees, were not dealt with by any act of Congress, either expressly or by implication. This court, in rendering its decision to the effect that the fees were taxable, carefully distinguished cases where, as at bar, the expenditure is made for the benefit of the party, as distinguished from expenditures incurred under order of the court to make possible, or to facilitate its consideration of the case.

People of Sioux County, Nebraska v. National Surety Co., 276 U. S. 238, 48 S. Ct. 239, 72 L. E. 547 and Business Men's Assurance Co. of America v. Campbell, 18 Fed. (2d) 223, remain to be considered. These cases involve the allowance of attorney's fees in actions prosecuted successfully against insurance companies or bonding companies by the beneficiaries of their policies or the obligees of their surety bonds. The Sioux County case, decided by this court, is later than the Business Men's Assurance Company case decided by the Circuit Court of Appeals, Eighth Circuit, and cites it, and since the two cases are to the same effect they may be considered together. The allowance of an attorney's fee, set by the court, was upheld in these two cases. In order to reach that conclusion, and not do violence

to the rule that where Congress has legislated as to costs, none except those named in the Act could be imposed, a line of reasoning was adopted which recognized the attorney's fee as being a part of the contractual liability of the insurance companies and bonding companies, which they had accepted by insuring risks in the state after the enactment of the statute authorizing the attorney's fees. This court in the Sioux County case held that the provision of the state statute to the effect that the attorney's fee should be allowed "as costs" did not make it costs as the term is used in the Federal Courts and, therefore, held that its allowance was not within the field of costs legislation covered by the Acts of Congress. That things which are within that field, such as witness fees, were not meant by this decision to be made determinable by state law is clear from the following quotations from the opinion:

> "In striking down so much of the judgment as allowed an attorney's fee the court below was persuaded that section 7811, which provides for an attorney's fee, authorized it only as costs to be taxed in the state court. As costs in the federal courts are regulated exclusively by R. S. §§ 823 and 824 (28 U. S. C. A. §§ 571, 572), the court concluded that other costs, authorized only by a state statute, could not be included in the judgment. See United States v. Sanborn, 135 U. S. 271, 282, 10 S. Ct. 812, 34 L. Ed. 112; The Baltimore, 8 Wall. 377, 388, et seq., 19 L. Ed. 463. Compare Ex parte Peterson, 253 U. S. 300, 314-319, 40 S. Ct. 543, 64 L. Ed. 919. * * *
>
> "That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like, allowed to counsel by R. S. §§ 823, 824. The present allowance, since it is not costs in the ordinary sense, is not within the field of costs legislation, covered by R. S. §§ 823, 824. That the particular

mode of enforcing the right provided by the state statute—i. e., by taxing the allowance as costs—*is not available to the federal courts* under R. S. §§ 823, 824, does not preclude the recovery. Since the right exists the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment." (Italics ours).

That part of the syllabus of this case as it is reported in 48 S. Ct. 239, dealing with this question, accurately sums it up in the following language:

"In an action against surety on bond of depository of county moneys, surety held liable for attorney's fees, to be included in judgment * * * under provision for allowance of such fees as costs in Comp. St. Neb. * * * *notwithstanding that costs in Federal Court are regulated exclusively by Rev. Stat. U. S.*, Sections 823, 824, since such allowance is not 'costs' in the ordinary sense." (Italics ours).

It is submitted that these two insurance cases dealing with attorney's fees are not determinative of a situation where witness fees are involved.

As long ago as 1890 this court recognized that the whole subject of fees in the courts of the United States is regulated by the federal statutes. In United States v. Sanborn, 135 U. S. 271 at 282 this court said:

"The whole subject of fees in the courts of the United States is regulated by chapter 16, title 'Judiciary' of the Revised Statutes. By section 823 it is provided that the fees allowed in that chapter and no other 'compensation' shall be taxed and allowed in the courts of the United States, to the officers therein named *and to witnesses*, except in cases otherwise expressly provided by law * * *". (Italics ours).

The "cases otherwise expressly provided by law", of course, refer to Federal law.

Trinidad Asphalt Paving Co. v. Robinson, 52 Fed. 347;
Merritt v. Merritt, 20 Fed. (2d) 541.

The general principle is well established that where Congress has legislated covering a particular field, there is no room for state regulation, and that the failure of Congress to legislate as to a particular matter in the field so covered nevertheless denies to the states the power to cover it by regulation of their own.

Northern Pacific Railway v. Washington, 222 U. S. 370, 32 S. Ct. 160, 56 L. E. 237;
Erie Railway v. New York, 233 U. S. 671, 34 S. Ct. 756, 58 L. E. 1149;
Napier v. Atlantic Coast Line, 272 U. S. 605, 47 S. Ct. 207.

As applied to the instant case, this doctrine means that where Congress has legislated respecting witness fees in United States courts and has made no exception as to expert witnesses, an intent is manifest to tax the fees of expert witnesses at the same rate as ordinary witnesses, and state legislation providing otherwise has no application in Federal Court.

Appellant's complaint that if she is denied the right to tax expert fees, she will be penalized for having brought her action in Federal Court, is not only immaterial, but is without merit. The witness fees and subsistence allowance for her ordinary witnesses, amounting to $5.00 per day for each witness under the Federal Statutes hereinbefore set forth, are five times what she would have been allowed in the Minnesota State Court. Section 7006 Mason's Minnesota Statutes, 1927, under the heading "Fees of Witnesses" provides as follows:

"1.- For attending in any action or proceeding in any court of record * * * $1.00 for each day".

So, when plaintiff, a resident of Nebraska (certificate Page 1), picked as her forum the United States District Court, District of Minnesota, rather than the State Court of Minnesota, it may be assumed that she expected to obtain certain advantages outweighing whatever disadvantages there might be.

CONCLUSION.

Since the Federal Statutes occupy the entire field of taxation of witness fees, and make no provision for the taxation of expert witness fees, aside from the statutory fees for any witness, such expert fees are not taxable. The certified question should, therefore, be answered "No".

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 387.—October Term, 1931.

Ruth J. Henkel, as Administratrix and Personal Representative of the Estate of Carl E. P. Henkel, Deceased, *vs.* Chicago, St. Paul. Minneapolis & Omaha Railway Company.	On certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[February 15, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This action was brought in the Federal District Court for the District of Minnesota under the Federal Employers' Liability Act to recover damages for the death of the plaintiff's intestate. Upon obtaining a verdict, the plaintiff asked for an order allowing fees for expert witnesses who had testified at the trial. The application was made under the following provision of the Minnesota statutes (Mason's Minn. Stat. 1927, sec. 7009):

"Expert Witnesses.—The judge of any court of record, before whom any witness is summoned or sworn and examined as an expert in any profession or calling, may, in his discretion, allow such fees or compensation as in his judgment may be just and reasonable."

Under this statute it appears to be the practice of the state courts of Minnesota to allow reasonable fees of expert witnesses, which are included in the taxable costs and become part of the judgment. The allowance is in the discretion of the trial court. *Farmer* v. *Stillwater Company*, 86 Minn. 59; 90 N. W. 10; *Melander* v. *County of Freeborn*, 170 Minn. 378, 381; 212 N. W. 590, 591.

The District Court denied the application for want of power under the Federal statutes. The Circuit Court of Appeals, having the judgment before it on appeal, has certified to this Court the following question:

"Has a United States District Court power and authority to allow expert witness fees, and to include the same as part of the

taxable costs in a law case, said United States District Court being for and sitting in a State the Courts of which are by a state statute authorized, in their direction, to allow expert witness fees, and the practice and usage in said state courts being to make such allowances and to include the same in the taxable costs, but there being no such usage and practice in said United States District Court?"

The Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, contained references to costs but no fee bill. By the Process Act of September 29, 1789, c. 21, 1 Stat. 93, it was provided that the "rates of fees . . . in the circuit and district courts, in suits at common law," should be the same as were "used or allowed" in state courts. This was a temporary act (*id.*, 123, 191) but, under it and later legislation of a similar sort, the Federal system was put in operation. It thus became "the practical usage of the Courts of the United States to conform to the State laws as to costs, when no express provision has been made and is in force by any act of Congress in relation to any particular item, or when no general rule of court exists on this subject." Mr. Justice Woodbury in *Hathaway* v. *Roach*, 2 Woodb. and M. 63, 67; Mr. Justice Nelson in "Costs in Civil Cases", 1 Blatchf. 652; *The Baltimore*, 8 Wall. 377, 390-392; *Ex parte Peterson*, 253 U. S. 300, 316. But when the Congress has prescribed the amount to be allowed as costs, its enactment controls. *The Baltimore, supra.*

Specific provision as to the amounts payable and taxable as witness fees was made by the Congress as early as the Act of February 28, 1799. c. 19, sec. 6, 1 Stat. 624, 626. See, also, Act of February 26, 1853, c. 80, sec. 3, 10 Stat. 161, 167; Rev. Stat. sec. 848. The statute now applicable is the Act of April 26, 1926, c. 183, 44 Stat. 323. U. S. C. Tit. 28, secs. 600a to 600d.[1] Under

[1]Sections 600a and 600c are as follows:

"600a. *Per diem; mileage.* That . . . witnesses (other than witnesses who are salaried employees of the Government, and detained witnesses) in the United States courts, . . . who attend, . . . shall be entitled to a per diem for each day of actual attendance and for each day necessarily occupied in traveling to attend court, . . . and return home, and, in addition, mileage as provided in sections 600b to 600d of this title.

"600c. *Amount of per diem and mileage for witnesses; subsistence.* Witnesses attending in such courts, . . . shall receive for each day's attendance and for the time necessarily occupied in going to and returning from the same $2, and 5 cents per mile for going from his or her place of residence

these provisions, additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed as costs in cases in the Federal courts. *The William Branfoot*, 52 Fed. 390, 395; *In re Carolina Cooperage Company*, 96 Fed. 604, 605; *Bone* v. *Walsh Construction Company*, 235 Fed. 901, 903, 904; *Cheatham Electric Company* v. *Transit Development Company*, 261 Fed. 792, 796.

The appellant, seeking the application of the statute of Minnesota, invokes the rule that "the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States in cases where they apply." U. S. C., Tit. 28, sec. 725. But this provision, by its terms, is inapplicable, as the Congress has definitely prescribed its own requirement with respect to the fees of witnesses. The Congress has dealt with the subject comprehensively and has made no exception of the fees of expert witnesses. Its legislation must be deemed controlling and excludes the application in the Federal courts of any different State practice. *United States* v. *Sanborn*, 135 U. S. 271, 282, 283; *Northern Pacific Railway Company* v. *Washington*, 222 U. S. 370; *Second Employers' Liability Cases*, 223 U. S. 1, 55; *Missouri Pacific Railroad Company* v. *Porter*, 273 U. S. 341, 346; *Lindgren* v. *United States*, 281 U. S. 38, 45.

In *Ex parte Peterson, supra*, the question related to the fees of an auditor appointed by the court, and as the court had power to appoint him, and there was no statute or rule of court on the subject, the court had authority to allow the expense in the items taxable as costs. *Id.*, pp. 314, 317. The case of *People of Sioux County* v. *National Surety Company*, 276 U. S. 238, was

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to the place of trial or hearing and 5 cents per mile for returning; *And provided further*, That witnesses (other than witnesses who are salaried employees of the Government and detained witnesses) in the United States courts, . . . who attend court . . . at points so far removed from their respective residences as to prohibit return thereto from day to day, shall, when this fact is certified to in the order of the court . . . for payment, be entitled, in addition to the compensation provided by existing law, as modified by sections 600a to 600d of this title, to a per diem of $3 for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to attend court and return home."

an action upon a surety bond. A Nebraska statute provided that in specified classes of cases, including that before the court, the plaintiff on obtaining judgment should be allowed a reasonable sum as an attorney's fee. The requirement was mandatory. This court held that in such a case the attorney's fee was recoverable in the Federal court but was careful to point out that the amount was "not costs in the ordinary sense" and hence was "not within the field of costs legislation" covered by the Federal statutes. In this view, the fact that the amount could not be taxed as costs in the Federal courts did not preclude the recovery. "Since the right exists," said the Court, "the Federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment." *Id.*, p. 244.

The present case is simply one of the amount to be allowed as witness fees, to be included in the taxable costs, and the Federal statute governs.

The question certified is answered "No."

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.